



**STATE OF NEW JERSEY**

***Board of Public Utilities***

***Two Gateway Center***

***Newark, NJ 07102***

***www.nj.gov/bpu/***

**TELECOMMUNICATIONS**

IN THE MATTER OF THE BOARD INVESTIGATION  
REGARDING THE RECLASSIFICATION OF INCUMBENT  
LOCAL EXCHANGE CARRIER (ILEC) SERVICES AS  
COMPETITIVE )

ORDER ON  
MOTION TO  
STRIKE

DOCKET NO.  
TX07110873

(SERVICE LIST ATTACHED)

BY COMMISSIONER FREDERICK F. BUTLER:

By Order dated November 28, 2007, in response to a request from Verizon New Jersey, Inc. ("Verizon"), the Board initiated this proceeding to fully investigate and consider the question of whether incumbent local exchange carrier ("ILEC") provided mass market retail services should be declared competitive pursuant to criteria set out in N.J.S.A. 48:2:21-19 (b), namely, ease of market entry, presence of other competitors and availability of like or substitute services in the relevant geographic area.

On January 24, 2008, United Telephone Company of New Jersey, Inc. d/b/a Embarq ("Embarq") filed a joint motion with Verizon to strike the reply testimony of Susan M. Baldwin submitted on behalf of the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel").<sup>1</sup> Embarq contends that the testimony should be stricken because it addresses costs, access charges and revenue issues which are inconsistent with the sole purpose of this proceeding which is to investigate whether ILEC provided retail mass market services are competitive. Embarq argues that the Board's Reconsideration Order explains that the issues related to cost of service, the level of access charges, and revenues are beyond the scope of the ILEC proceeding.

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<sup>1</sup> Embarq filed this motion with the full concurrence and approval of Verizon.

Specifically, Embarq contends that Ms. Baldwin's testimony inappropriately addresses the issue of costs on page 4, lines 3-9 and, lines 18-20; page 122, line 9 through page 123, line 6; page 151, line 3-7; page 154, line 2 through page 155; and page 157, lines 16-19. Embarq cites the Board's Order on Reconsideration in this matter as evidence of the Board's finding that the issues of cost of service, intrastate access charges and revenues are outside the scope of this proceeding. Further, according to Embarq, the Board has stated that the issue of cost of service has not been a consideration in past cases involving the question of whether a service should be reclassified as competitive. Embarq contends that Ms. Baldwin's testimony focuses squarely on the issue of intrastate switched access rates on page 6 lines 7-9 and lines 14-19; page 11, lines 1-3; page 78, line 6 through page 81, line 8; and page 93 line 4 through page 100. Accordingly, Embarq seeks that these sections be stricken.

Further, Embarq stated that the Reconsideration Order instructs that issues related to revenue and profits are also beyond the scope of this proceeding. Embarq argues that page 6, line 10; page 101, line 2 through page 116, line 8; page 149, line 3 through page 151, line 2; page 151, line 19 through page 152, line 5; page 153, lines 7 through page 154, line 14; pages 157, lines 2-3; and page 157, lines 6-9 should all be stricken as they specifically address revenue and earnings issues which are outside the scope of this matter. Embarq contends that repeatedly, Ms. Baldwin's testimony impermissibly reaches issues that are not part of the case, and therefore, should not be made part of the record.

By letter dated January 31, 2008, Rate Counsel argues that the reply testimony submitted by Ms. Baldwin responds directly to the points brought up by the Petitioners in their initial testimony. Rate Counsel supports its contention that Ms. Baldwin's reply testimony is relevant to this case by stating that the testimony goes to the three criteria being considered in making a determination regarding the competitiveness of a service. Further, Rate Counsel contends that Ms. Baldwin's testimony will assist in the development of a full and complete record. Rate Counsel contends that Verizon and Embarq witnesses Vasington and Staihr submitted testimony on cost structures and their impact on the competitive criteria. Accordingly, Rate Counsel argues that Ms. Baldwin must be permitted to respond to the Petitioners' claims and advance Rate Counsel's own theories of the case. Rate Counsel also states that Mr. Vasington submitted testimony regarding the issues of revenues and profits, and therefore, any testimony of Ms. Baldwin addressing revenues and profits should be admitted.

Regarding access charges, Rate Counsel argues that Verizon and Embarq, by seeking to have Selective Calling and Intra Municipal Calling services be deemed competitive, have initiated a review of the issue of intrastate access charges. Rate Counsel further claims that above cost intrastate access rates affect whether the criteria set forth in N.J.S.A. 48: 2-21.19(b) are met and whether intrastate access rates are subsidizing competitive services.

Rate Counsel argues Verizon's own rebuttal testimony serves to join the issues of cost, intrastate access charges and revenues. Also, Rate Counsel argues that should the Board strike portions of Ms. Baldwin's testimony, Rate Counsel seeks that Verizon's rebuttal testimony be stricken in its entirety.

On February 6, 2008, Embarq filed a reply to Rate Counsel's opposition to its motion to strike portions of the reply testimony of Ms. Baldwin. Embarq asserts that a full record of

irrelevant points does not promote the public interest nor does it aid the record in this matter. Embarq alleges that Rate Counsel misrepresents Mr. Vasington's testimony regarding cost structures, arguing that Ms. Baldwin's testimony is impermissible because it inappropriately ties cost information with Petitioners' rates. Embarq contends that Rate Counsel can not base its case on cost data that the Board has previously held is not relevant to this proceeding.

Embarq further asserts that Rate Counsel's revenues and profits testimony is unsupported and has no place in this proceeding. Embarq argues that the limited use of the term revenues by the Petitioners does not serve to expand the scope of the proceeding as claimed by Rate Counsel.

Embarq also points out that any attempt to include access charges in this proceeding has been explicitly excluded by the Board's Reconsideration Order, and therefore, Rate Counsel's submission of testimony on that issue should not be part of this proceeding.

Finally, Embarq contends that the Board should grant its motion to strike portions of Ms. Baldwin's testimony but that Rate Counsel's motion to strike Verizon's reply testimony should be denied as Rate Counsel failed to provide any basis in law or fact to support its motion.

## **DISCUSSION**

The criteria for determining whether a service is competitive are set forth in N.J.S.A. 48:2-21.19 and involves a review of the ease of market entry, presence of competitors, and the availability of like or substitute services in the relevant geographic area.

As discussed in the previous orders, and as evidenced in the discussions set forth above, the issue of the level of intrastate access rates, while important to the Board and to the parties, is not within the scope of this current pending proceeding. The question of the reasonableness of intrastate access rates and charges is not being tested in this case. The appropriate level for intrastate access rates is not an element for investigation in a determination of whether mass market retail services are competitive. The dispute between the parties is whether the appropriate level of intrastate access charges is relevant to the question pending regarding reclassification of mass market retail services. The Board has spoken to this issue and found that it is not.

A review of the reply testimony of Ms. Baldwin reveals that much of the testimony pertaining to access goes beyond the scope of this proceeding. Thus, testimony related to the level of intrastate access rates submitted by Ms. Baldwin, with the exception of the testimony which claims access rates are a barrier to entry on page 6, lines 14 & 15, are **HEREBY STRICKEN** from the record in this proceeding, but may be submitted in the Board's future proceeding on the issue of the appropriate level of intrastate access rates. Specifically, as cited in Exhibit A, the following testimony is not admitted: page 6, line 7-9; page 6, lines 16-19, page 11, lines 1-3; page 78, lines 6 through page 81, line 8; page 93, line 4 through page 100. However, page 6, lines 14 & 15 are not stricken as they are relevant to Rate Counsel's position regarding barriers to entry which is an element for consideration in this case.

The testimony of Ms. Baldwin regarding cost issues and revenue/earnings issues which are also referenced in Exhibit A, also addresses issues which have already been ruled

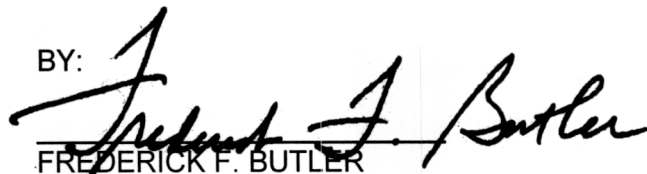
upon as being beyond the required review in this matter. A finding has been made by the Board that costs and revenues are not a consideration in determining whether ILEC mass market services are competitive. Studies of the level of revenues and profits, as well as of costs of service, are not required when making a declaration concerning the competitiveness of a service. The factors for consideration are set forth in N.J.S.A. 48:2-21.19, and the arguments submitted by the Petitioners against admission of Ms. Baldwin's testimony related to costs, revenues and earnings are consistent with the previous rulings referenced herein. However, in an effort to give the broadest latitude to Rate Counsel, the testimony of Ms. Baldwin related to these issues will HEREBY BE ADMITTED into the record in this matter, and will be accorded the appropriate weight as permitted. Specifically, I HEREBY ADMIT the following testimony: a) on cost issues: page 4, lines 3-9; page 4, lines 18-20; page 122, line 9 through page 123, line 6; page 151, lines 3-7; page 154, line 2 through page 155; page 157, lines 16-19; b) on revenues and earnings issues: page 6, line 10; page 101, line 2 through page 116, line 8; page 149, line 3 through page 151, line 2; page 151, line 19 through page 152 line 5; page 153, line 7 through page 154, line 14; and page 157, lines 2-3 and lines 6-9.

Finally, the Motion of Rate Counsel to strike the rebuttal testimony of Verizon in its entirety is HEREBY DENIED as unsupported.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: **2-15-08**

BY:

  
FREDERICK F. BUTLER  
COMMISSIONER

**IN THE MATTER OF THE BOARD INVESTIGATION REGARDING THE  
RECLASSIFICATION OF INCUMBENT LOCAL EXCHANGE CARRIER  
(ILEC) SERVICES AS COMPETITIVE**

**DOCKET NO. TX07110873**

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